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NO. 83-2138

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION OF DAYTON, OHIO,

Appellant,

vs.

VAN W. PAGE, ET AL.,

Appellees.

On Appeal from the Court of Appeals
Twelfth Appellate District of Ohio.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION OF APPELLEES JAMES D. ETHRIDGE AND EVA N. ETHRIDGE

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QUESTION PRESENTED

Where the parties to an Ohio mortgage have limited the right of the savings and loan to accelerate the loan *as a matter of contract,* will the ambiguous regulations of the Federal Home Loan Bank Board in effect in 1979 be permitted to supercede the intent of the parties?

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JURISDICTION OF THIS COURT

The alleged "appeal" is not correctly taken and jurisdiction is not correctly conferred upon this Court by 28 U.S.C. § 1257 (2) as indicated by Appellant. This statute is reproduced at Appendix 1a. Under that statute this Court has appellate jurisdiction where there is drawn in question the

validity of a State Statute on the ground of its being repugnant to the Constitution or laws of the United States and the decision is in favor of its validity. This usually involves the situation where a state statute's validity is tested due to its being squarely in conflict with the U.S. Constitution or the federal statute on the subject and the lower court has upheld the state statute. Appellant's own two cited cases clearly indicate that his reliance upon 28 U.S.C. § 1257 (2) to obtain appellate jurisdiction is misplaced. Those two cases dealt with labor-relations and specifically whether a state's employment relations board's actions conflicted with the National Labor Relations Act.

In the instant case there are no two conflicting statutes, one state and one federal, that are repugnant to one another, and no lower court decision upholding the state statute.

The petition for writ of certiorari likewise should be denied because jurisdiction is not properly conferred upon this Court by 28 U.S.C. § 1257 (3). Appendix 1a. There is no state court opinion deciding a federal question in a way in conflict with the decision of another state court, federal court of appeals, or this court. U.S. Supreme Court Rule 17. Appendix 2a.

STATEMENT OF THE CASE

On August 3, 1979, Appellees Van W. Page and Cynthia A. Page (the "Pages") borrowed $37,000.00 from Appellant Citizens Federal Savings and Loan Association ("Citizens Federal"), a federally chartered savings and loan association located in Dayton, Ohio. The note was secured by a mortgage on real property. Thereafter the Pages sold this real property to James D. Ethridge and Eva N. Ethridge (the "Ethridges") by means of land contract.

The mortgage between the Pages and Citizens Federal contained an acceleration or "due-on-sale" clause (Paragraph 17) which read in part as follows:

"If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this mortgage, . . . Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable."

Citizens Federal, upon learning of the land contract, commenced an action to foreclose the mortgage, believing Paragraph 17 gave them that right. The County Treasurer and the Ethridges were named additional defendants to ensure that their rights in the property would be protected in the action. The Ethridges and Pages moved for summary judgment and the trial court granted the motion on February 25, 1983 ruling that a land contract, being subordinate to the mortgage, fell within exemption (a) of Paragraph 17 and the mortgage could not be foreclosed.

Citizens Federal appealed to the Court of Appeals, Twelfth Appellate District of Ohio, which affirmed the trial court's decision. That court carefully examined the interplay between The Federal Home Loan Bank Board regula-

tions governing Citizens Federal and contract law involved in the case and found that the meaning of that clause in this particular mortgage in the context of Ohio property law did not give Citizens Federal the right to foreclose when a land contract was signed. The Supreme Court of Ohio denied hearing on Citizens Federal's motion for Certiorari No. 84-328.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The question presented is not substantial.

The Court is not faced here with a challenge to the supremacy of federal law as it was in *Fidelity Federal Savings and Loan Association* v. *de la Cuesta,* 458 U.S. 141 (1982). That case barred state law restrictions, such as California's prohibition of unreasonable restraints on alienation, on the exercise of due-on-sale clauses by federal savings and loan associations. Appellees and both the lower courts in the instant case concede that state law is preempted by the federal regulations where it conflicts with same. *Fidelity Federal Savings and Loan Association* v. *de la Cuesta* (1982), 458 U.S. 141, 102 S. Ct. 3014; *First Federal Savings and Loan Association* v. *Myrick* (W.D. Ark. 1982), 533 F. Supp. 1041; 12 CFR 545.6 (a). The correct analysis of the case at bar however clearly shows there is no conflict with the regulations of the F.H.L.B.B. in effect in 1979 and state law.

The applicable Federal Home Loan Bank Board regulations dealing with due-on-sale clauses in effect in 1979 were ambiguous and stated in pertinent part as follows:

> 12 CFR 545.6-11 (f) "Due on Sale clauses. A federal association continues to have the power to include, *as*

a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, *exercise* by an association of such an acceleration option (hereafter called a due on sale clause) *shall be governed exclusively by the terms of the contract between the association and the borrower,* and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

(g) Limitations on the exercise of due on sale clauses.

(1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a federal association may not exercise a due on sale clause based on any of the following:

(i) Creation of a lien or other encumbrance subordinate to the Association's security instrument;" (emphasis ours)

The Bank Board itself recognized the ambiguity with regard to the land contract situation and cleared it up when it adopted regulations pursuant to the Garn-St. Germain Act, which extended to all lenders, both state chartered and federally chartered, the benefit of federal preemption with respect to their due-on-sale practices.

The final regulations of the Bank Board were published on 5/13/83 and appear at 12 C.F.R. § 591 et seq. They are quite different as to the matter in issue here from the

prior regulations applicable to only Federal associations. In pertinent part they state:

> § 591.5 Limitation on exercise of due-on-sale clauses. (a) General. Except as provided in § 591.4 (c) and (d) (4) of this Part due-on-sale practices of Federal associations and other lenders shall be governed exclusively by the Board's regulations, in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise including, without limitation, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and *state law dealing with equitable transfers.*
>
> (b) Specific Limitations. With respect to any loan on the security of a home occupied or to be occupied by the borrower.
>
> (1) A lender shall not (except with regard to a reverse mortgage) exercise its option pursuant to a due-on-sale clause upon: (i) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does *not relate to a transfer of rights of occupancy in the property*: *Provided that such lien or encumbrance is not created pursuant to a contract for deed.* (emphasis ours)

Thus there is no question that today these regulations would permit Citizens Federal to foreclose its mortgage upon the execution of a land contract such as took place in the instant case, assuming the mortgage between it and the mortgagors contained language tracking the above regulations exactly and assuming it was executed after the regulations took effect. However, the instant mortgage was executed pursuant to the old regulations, which did not contain specific language that a land contract would trigger the due-on-sale clause and which contained more references

to the fact that the parties' rights were governed exclusively by the terms of the contract, etc.

B. The judgment rests on an adequate non-federal basis.

Let us now turn to the actual mortgage contract, for the issue in the instant case is not the interpretation of the regulations but the interpretation of the mortgage instrument itself which reads in pertinent part:

> "If all or any part of the property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) creation of a lien or encumbrance subordinate to this Mortgage . . . Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable."

The mortgage in the instant case provides that the due-on-sale clause may be invoked upon a sale or transfer of interest in the secured property "excluding (a) the creation of a lien or encumbrance subordinate to this mortgage." It is well settled contract law in Ohio that a sale by land contract creates an equitable lien in favor of the vendee for the amount paid on the purchase price. See *Wayne Building and Loan Company* v. *Yarborough* (1967), 11 Ohio St. 2d 195, and *Butcher* v. *Kagy Lumber Co.* (1955), 164 Ohio St. 85. A land contract is among the liens and encumbrances for which a title examiner is charged with ascertaining during the course of his title examination. *West's Ohio Practice-Real Estate Transactions*, Vol. 3, Ch. 3, Section 45. The legislature in Ohio has defined land contract to be an encumbrance or lien. O.R.C. § 317.08 states that in the record of mortgages, i.e. encumbrances, the Recorder must keep all executory installment contracts. See O.R.C. § 5313.01.

Further, the lien created by the land contract is subordinate to the lien of Citizens Federal. Thus the parties by the express terms of their contract did not grant Citizens Federal the right to exercise the due-on-sale clause in the event Appellees Page transferred the property pursuant to a land contract arrangement. Both lower courts correctly looked to the plain meaning of the language in reaching this result. Said result is completely consistent with the view held by this Court regarding due-on-sale clauses as recently enunciated in *Fidelity Federal Savings and Loan Association* v. *de la Cuesta*, 458 U.S. 141, 73 L Ed 2d 664 (1982). In fact the result reached by the lower state courts in the instant case is mandated by this Court's language which follows:

> "Moreover, in our view, the second sentence of § 545.8-3 (f) simply makes clear that the regulation does not empower federal savings and loans to accelerate a loan upon transfer the security property unless the parties to the particular loan instrument *as a matter of contract*, have given the lender that right. Similarly, if the parties to a given contract agree somehow to limit the associations' right to exercise a due-on-sale provision, the second sentence of § 545.8-3 (f) precludes the lender from relying on the first sentence as authorizing more expansive use of the clause." *Fidelity*, 73 L.Ed 2d 664 at 678. (Emphasis ours)

Paragraph 17 of the instant mortgage allows Citizens Federal to participate in the nationwide secondary mortgage market system. The drafter of Paragraph 17 has taken bits and pieces of the language from the earlier regulations and accomplished that purpose. However, paragraph 17 does not allow Citizens Federal to do what they were seeking to do in this particular case, i.e. to foreclose because a land contract was signed. Rather its terms prohibit Citizens Federal from doing so.

Assuming arguendo that the *intent* of the earlier regulations taken together was to allow foreclosure upon the signing of a land contract, the text of 12 C.F.R. 545.6-11 (f) and (g) (1) (i) are not made available to the borrower, are not set out in full in the instant mortgage, and are not incorporated by reference thereto in the mortgage. Further, there is no *separate section* in the instant mortgage authorizing the lender to invoke the due-on-sale clause upon any sale or transfer of interest in the property as there is in the earlier regulations. There is no language in the instant mortgage to the effect that the exception to the due-on-sale clause applies only to borrower occupied homes, as there is in the earlier regulations. The earlier regulations and the mortgage are simply two separate and different documents. They do not say the same thing.

Lastly, if there is any doubt about the plain meaning of the words used in this mortgage, it is dispelled by returning to time-worn principles. There is a fundamental contract law rule of construction that if there is doubt or ambiguity in the language, the document is to be construed strictly against the party who prepared it or selected its language. *Central Realty Co.* v. *Clutter* (1980), 62 O.S. 2d 411, 16 O.Ops. 3d 441, 406 N.E. 2d 515. *Cullen* v. *Government Savings & Loan Company*, 39 O Misc 125, 68 O.Ops 2d 298, 316 N.E. 2d 498.

The particular clause at issue is somewhat buried on page three of a four page (legal size pages) document, appearing in rather small type, on a printed form contract prepared by Citizens Federal. Clearly the clause — paragraph 17 — should be construed most favorably to the borrowers and strictly against Citizens Federal.

The two lower state courts have not cavalierly and nonchalantly undone the federal preemption doctrine as ac-

cused by Citizens Federal. Rather they have simply applied the analysis directed by this Court.

CONCLUSION

The question presented is not substantial. The resolution of this appeal will not affect thousands of lenders nationwide. It will affect at the least only Citizens Federal, and at the most other federally chartered savings and loans in Ohio who used this same paragraph 17 from August 1, 1977 to May 13, 1983 when the Bank Board published the new, final regulations in the wake of the Garn-St. Germain Act. The continuing viability of federal control of due-on-sale practices is left intact. The state court has merely applied time-honored principles of contract law and property law to solve a contractual interpretation problem. It is respectfully requested that this appeal and/or petition be dismissed.

August 3, 1984

Respectfully submitted,

TIMOTHY A. OLIVER
Attorney for Appellees Ethridge

APPENDIX

UNITED STATES CODE, TITLE 28:

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

UNITED STATES SUPREME COURT RULES

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

WEST'S OHIO PRACTICE

§ 45. Encumbrances in County Recorder's Office

The fourth step is to ascertain the existence of liens and incumbrances that may be revealed by an examination of the indexes of appropriate records maintained by the County Recorder.

Land Contracts. (1) *One-Year Installment Contracts Executed after August 10, 1961.* All executory installment contracts for the sale of land, executed after August 10, 1961, which by the terms thereof are not to be performed by one or more of the parties within one year of the date of such contracts must be signed by the vendor, attested and acknowledged [R.C. § 5301.01], and recorded with the Recorder of the county in which the land is situate. They are to be recorded in the Mortgage Books [R.C. § 317.08, effective August 11, 1961]. When properly executed and recorded, they constitute constructive notice even as to subsequent bona fide purchasers having, at the time of purchase, no knowledge of such contracts. [R.C. § 5301.25.]

OHIO REVISED CODE

§ 5313.01 Definitions.

As used in Chapter 5313. of the Revised Code:

(A) "Land installment contract" means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.

(B) "Property" means real property located in this state improved by virtue of a dwelling having been erected on the real property.

(C) "Vendor" means any individual, partnership, corporation, association, trust, or any other group of individuals however organized making a sale of property by means of a land installment contract.

(D) "Vendee" means the person who acquires an interest in property pursuant to a land installment contract, or any legal successor in interest to that person.

(E) "Legal description" means a description of the property by metes and bounds or lot numbers of a recorded plat including a description of any portion of the property subject to an easement or reservation, if any.

OHIO REVISED CODE

§ 317.08 Records to be kept by county recorder.

The county recorder shall keep five separate sets of records as follows:

(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices, as provided for in sections 5301.47 to 5301.56 of the Revised Code; all judgments or decrees in actions brought under section 5303.01 of the Revised Code; all declarations and bylaws as provided for in sections 5311.01 to 5311.22 of the Revised Code; affidavits as provided for in section 5301.252 [5301.25.2] of the Revised Code; all certificates as provided for in section 5311.17 of the Revised Code; all articles dedicating archaeological preserves accepted by the director of the Ohio historical society under section 149.52 of the Revised Code; all articles dedicating nature preserves accepted by the director of natural resources under section 1517.05 of the Revised Code; and all agreements for the registration of lands as archaeological or historic landmarks under section 149.51 or 149.55 of the Revised Code;

(B) A record of mortgages, in which shall be recorded:

(1) All mortgages, including amendments, supplements, modifications, and extensions thereof, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or

more of the parties thereto within one year of the date of such contracts;

(3) All options to purchase real estate, including supplements, modifications, and amendments thereof, but no such instrument shall be recorded if it does not state a specific day and year of expiration of its validity.

(C) A record of powers of attorney;

(D) A record of plats, in which shall be recorded all plats and maps of town lots, and of the subdivision thereof, and of other divisions or surveys of lands, and any center line survey of a highway located within the county, the plat of which shall be furnished by the director of transportation or county engineer and all drawings as provided for in sections 5311.01 to 5311.22 of the Revised Code;

(E) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments thereof.

All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record in one volume unemployment compensation liens, federal tax liens, personal tax liens, mechanics liens, notices of liens, certificates of satisfaction or practical release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, and liens provided for in section 5311.18 of the Revised Code.

The recording of an option to purchase real estate, including any supplement, modification, and amendment thereof, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the instrument.